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October Term, 2000

JOHN ASHCROFT, ATTORNEY GENERAL
OF THE UNITED STATES,
Petitioner,

v.

AMERICAN CIVIL LIBERTIES UNION, *ET AL.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF OF *AMICI CURIAE* AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS, *ET AL.* IN SUPPORT OF RESPONDENTS

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LIST OF *AMICI CURIAE*:

AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS, AUTHORS GUILD, BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM, CALIFORNIA MUSEUM OF PHOTOGRAPHY/UNIVERSITY OF CALIFORNIA AT RIVERSIDE, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, PETER LUDLOW, CHUCK MORE, DON RITTNER, SAFER SEX INSTITUTE, AND THE SEXUALITY INFORMATION AND EDUCATION COUNCIL OF THE UNITED STATES

ALL PARTIES CONSENT TO THE FILING OF THIS *AMICUS* BRIEF

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JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES,
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BRIEF OF *AMICI CURIAE* AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS, *ET AL.* IN SUPPORT OF RESPONDENTS

After this Court held in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), that the Communications Decency Act ("CDA") unconstitutionally infringed on the First Amendment rights of adults, Congress tried to accomplish its goal of protecting minors from sexually explicit online speech by enacting the Child Online Protection Act of 1998 ("COPA"), 47 U.S.C. § 231. However, although the wording of COPA is narrower than that of the CDA, it suffers from the same constitutional flaw as its predecessor: it still restricts Internet speech available to adults to only that which Congress believes is appropriate for children. As a result, *amici* – most of whom also filed an *amicus* brief in *Reno* – submit this brief to urge the Court to affirm the holding of the United States Court of Appeals for the Third Circuit that COPA impermissibly infringes rights protected by the First Amendment.[1]

1. This brief was not authored in whole or in part by counsel for either party. No person or entity, other than the *amici curiae* and

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are businesses, organizations, and individuals that use the World Wide Web to engage in speech and other forms of expression on wide-ranging subjects and who require and believe firmly in freedom of expression in connection with their use of the Web. Some are individuals (or organizations representing individuals) for whom the World Wide Web provides an unprecedented opportunity to publish and disseminate speech on issues that they consider important. One is an educator and consultant who uses the World Wide Web for both teaching and research. Another is an art gallery owner that uses the World Wide Web to display his current exhibitions. A complete list of *amici*, with descriptions of their uses of the World Wide Web, their interest in this litigation, and the impact that enforcement of COPA would have on their varying uses of the Web, is set forth in a more detailed Statement of Interest of *Amici Curiae* that is appended to this brief. *Amici* have a unique ability to illustrate one of the fatal flaws in COPA: its overbreadth. As users of the World Wide Web, *amici* are directly affected by the deterrence of speech that COPA's overbreadth causes.

SUMMARY OF ARGUMENT

COPA imposes criminal and civil penalties for any communication on the World Wide Web that includes material deemed "harmful to minors" if the communication is related to a commercial purpose. 47 U.S.C. § 231(a)(1). COPA's definition of what is "harmful to minors" is broad enough to encompass material that has legitimate First Amendment value for adults. The congressional attempt to correct the deficiencies of the CDA

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their counsel, made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief, and letters of consent are being lodged with the Clerk.

thus fails because COPA again criminalizes valuable and constitutionally protected speech in a broad sweep that is not narrowly tailored to achieve Congress' stated justification. The statute cannot achieve its stated ends without simultaneously inhibiting or prohibiting *amici*'s constitutionally protected and socialiy valuable speech. The statute therefore is unconstitutionally overbroad. The purpose of this brief is to illustrate COPA's overbreadth as it applies to *amici* and others like them.[2]

ARGUMENT

In Criminalizing Speech that is Appropriate for Adults, COPA Is Unconstitutionally Overbroad.

A statute violates the First Amendment when it proscribes more speech than is necessary to further a compelling governmental interest. *See, e.g., Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989). A classic example of such unconstitutional overbreadth is a law that allows adults to receive or engage in only speech that is deemed fit for children. *Lorillard Tobacco Co. v. Reilly*, 121 S. Ct. 2404, 2426-27 (2001); *Reno*, 521 U.S. at 874; *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 755, 760 (1996); *Sable*, 492 U.S. at 128; *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73 (1983); *Butler v. Michigan*, 352 U.S. 380, 383 (1957). COPA is just such a statute.

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2. To illustrate COPA's overbreadth, this brief cites web pages of *amici* and others that may be endangered by the statute. For the Court's convenience, *amici* are lodging with the Clerk a compact disk that contains an electronic version of this brief in portable document format (.PDF). The citations to web pages on that disk are hyperlinked to cached copies of the cited web pages that are included on the compact disk. All of those web pages were cached to the disk on September 13-17, 2001, and *amici*'s citations are intended to be to the versions of those web pages as they existed on that date.

Amici do not challenge Congress' asserted interest in seeking to protect children from harmful material on the Internet. But even if the interest in protecting children from pornography is substantial, it cannot justify COPA's content-based restriction of speech for adults.[3]

A. COPA's Language Fails To Protect Against Prosecution of Speech That Is Valuable for Adults.

The Government's brief accurately states that a major congressional objective behind COPA was to eliminate

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3. This brief does not focus on the availability of means less restrictive than COPA's broad criminalization of speech to satisfy Congress' objective. Nevertheless, the lack of Congressional efforts to find alternatives is startling. One Senator complained: "The Congress has made only the most minimal efforts to determine whether technical tools or this measure would be the least restrictive means of protecting children. There has been no study, no discussion, and no comparison of the effectiveness of various approaches, their likely impact on speech, and their appropriateness for the Internet." 114 Cong. Rec. S. 12741, at S12795 (remarks of Sen. Leahy). At the time it enacted COPA, Congress established a Commission on Online Child Protection to study methods of reducing minors' access to harmful material on the Internet. COPA § 1405, 112 Stat. 2681-736. To no avail, the Justice Department urged Congress to await the Commission's report before enacting a new criminal statute. *See* 114 Cong. Rec. S 12741 *et. seq.* (Oct. 5, 1998 letter from Justice Dept., Off. of Leg. Affairs, to Sen. Commerce Comm. Chairman Bliley). Congress did not fund the Commission, and, because of delays appointing its members, the unfunded Commission had to work on a compressed schedule. It nevertheless evaluated various technological solutions available, including those relating to the credit-card and age-verification defenses ratified in COPA, and concluded that alternative measures, such as home filtering applications, were more effective and less restrictive. Comm. on Child Online Protection, Report to Congress (Oct. 20, 2000), *http://www.copacommission.org/report/COPAreport.pdf*.

"teasers" for pornographic pictures from material accessible to minors. *Amici* do not publish such material or seek access to it. But *amici* reasonably believe, and the courts below have agreed, that COPA does not have such a narrow reach. COPA makes it a crime to publish a broad range of material on the World Wide Web and, as the district court noted (Pet. App. at 94a-95a), is not limited to just the images found in "teasers." COPA criminalizes (with a $50,000 fine, imprisonment for up to six months, or both) "*any* communication for commercial purposes that is available to *any* minor and that includes *any* material that is harmful to minors." 47 U.S.C. § 231 (emphasis added).[4]

The brief by Members of Congress John S. McCain, *et al.* (at pp. 4, 13) asserts that "the courts below did not *find* COPA unconstitutional, they *made* it unconstitutional" by interpreting it too broadly. But the courts below had to deal with the statute as written, not as the Government and its *amici* would have liked it to have been written. There is no reason to believe that the four federal judges who concluded that COPA sweeps too broadly set out deliberately to give COPA an unconstitutional scope. In issuing the injunction, Judge Reed went out of his way to express his "personal regret" that the statute was invalid (Pet. App. at 96a-97a), and Circuit Judge Garth, joined by Judges Nygaard and McKee, echoed Judge Reed's sentiments (*id.* at 38a).

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4. COPA states: "Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than $50,000, imprisoned not more than 6 months, or both." 47 U.S.C. § 231(a)(1). The rest of Section 231(a) provides for increased fines for intentional violations and allows for civil penalties.

Congress tried in COPA to remedy constitutional flaws that this Court identified when it struck down the CDA in *Reno*, but its effort did not succeed. Insofar as is relevant here, there are two main differences between COPA and the CDA. First, COPA is limited to material published "for commercial purposes." Some of these *amici* are non-profit organizations that adhere strictly to guidelines under federal and state law for maintenance of that status. If COPA had removed from its application all such organizations as defined, for example, by the Internal Revenue Code, 26 U.S.C. § 501(c), publishers would have welcomed that bright-line defense and been able to proceed with some assurance that their publications were not vulnerable to criminal prosecution.

But COPA contains no such exception. Rather, its convoluted definition of the "commercial purposes" needed for liability mixes ideas about whether the publisher "devotes time, attention, or labor" to making communications, has an "objective" of making a profit "as a result of such activities," does or does not necessarily make a profit, does or does not necessarily lack other sources of income, and knowingly posts or solicits material for publication.[5] This definition is so unclear that *amici*

5. The definitions in Section 231(e)(2) provide:

> (A) COMMERCIAL PURPOSES. – A person shall be considered to make a communication for commercial purposes only if such person is engaged in the business of making such communications.
>
> (B) ENGAGED IN THE BUSINESS. – The term "engaged in the business" means that the person who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income). A person may be considered to be engaged in the business of making, by means of the World Wide Web, communications for commercial purposes that include material that is harmful to minors, only if the person knowingly causes the material that is harmful to minors to be posted on the World Wide Web or knowingly solicits such material to be posted on the World Wide Web.

have no assurance that they are not covered by it if, for example, they allow sponsorships on their web pages, share receipts from sales made by partners under linking agreements, or solicit contributions to fund their web sites – even though such activities strictly conform to the tax guidelines for non-profits. Both the district court and court of appeals held that the members of the organizational plaintiffs in this case have standing because their fears of prosecution are not unreasonable – even though some of them are non-profit entities. Pet. App. at 16a, 50a-54a.

COPA's second major change from the CDA is that the statute bans only material that meets a three-part test defining what is "harmful to minors."[6] To be sure, this

6. COPA states:

> The term "material that is harmful to minors" means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that –
>
> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, prurient interests;

definition is more specific than the exceptionally vague proscription of "indecent" and "patently offensive" material in the CDA, but that is faint praise indeed.

The Government argues that "the harmful-to-minors test . . . narrowly cabins the material that is covered by the Act," particularly because the third prong of the test (a requirement that the material lack serious literary, artistic, political, or scientific value for minors) "significantly circumscribes" what may be prosecuted as a matter of law. Pet. Br. at 33-34. Warming to this theme, the Government's Congressional *amici* (at pp. 8 & n.2, 23-27) insist that judicial decisions prevent any overly broad application of COPA to most sexually-related speech on the Web. But, of course, those same judicial decisions applied to the CDA and still did not save it from unconstitutionality. Court decisions have established no nationally uniform standard of what is "harmful to minors" — an objective undermined by the very subjectivity of the concept. Even if the third prong of the statute's definition removes some material from the vagaries of juries, the *legal* question whether various types of materials have "serious . . . value for minors" is far from clear.

(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

47 U.S.C. § 231(e)(6). Unlike the CDA, which proscribed all types of Internet communications, COPA is limited to communications using the World Wide Web (that is, Internet material accessible through the hypertext transfer protocol) and relates only to material available to "minors" under 17 years of age. *Id.* § 231(e)(1), (7).

One of the main cases on which the Government and its *amici* rely, *Virginia v. American Booksellers Ass'n.*, 484 U.S. 383 (1988), illustrates the problem. Both the district court and the court of appeals in that case reasonably believed that the Virginia statute before them made it a crime to exhibit to juveniles any of the 16 books placed into evidence. On certiorari, this Court found that question so unclear that it certified it to the Supreme Court of Virginia, the only authoritative arbiter of the statute's scope. The Virginia Supreme Court then reviewed each of the books and concluded that they "vary widely in merit" but had "serious . . . value for a legitimate minority of normal, older adolescents" and therefore were not in violation of the statute. *Virginia v. American Booksellers Ass'n.*, 236 Va. 168, 177, 372 S.E.2d 618, 624 (1988).[7]

COPA is a federal statute of nationwide application, and the only tribunal that can authoritatively say whether a work is punishable under it is this Court. Even assuming that this Court, through frequent grants of certiorari, were willing to undertake that task for the myriad of sexually explicit works on the World Wide Web, the economic and other resources necessary for small web publishers to

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7. The source of the Virginia court's "normal, older adolescents" standard is unclear, as are its implications with respect to younger children, and it is unclear whether the Government's brief advocates it. *See* Pet. Br. at 34-35. The Congressional *amici* say (p. 23) that COPA should bar speech inappropriate for "minor children of the intended and probable age groups to which it is exhibited." But COPA's proscription applies to communications that are "available to *any* minor" (§ 231(a)(1)); it makes no age distinctions. Following the Virginia Supreme Court's construction, the constitutionality of the Virginia statute was upheld by the Fourth Circuit, but an extension of the statute to Internet communications has since been enjoined because web publishers are unable to distinguish between adults and minors (of whatever age) in their audience. *PSINet, Inc. v. Chapman*, 108 F. Supp. 2d 611 (W.D. Va. 2000).

obtain such an authoritative declaration will deter most of them from seeking that relief. There is no readily available *American Booksellers*-type certification solution for them to employ. As a result, they must choose either to risk prosecution or to err on the side of limiting what they publish.

The differences between COPA and the CDA therefore do not make COPA constitutional. Rather, far more important than these differences is the key *similarity* between COPA and the CDA. Like the CDA, COPA applies to all content that is "available to any minor," and on the Web there is no reliable way for content providers to distinguish between what is available to minors and what is available to adults unless they implement screening measures that themselves will deter speech. Pet. App. at 89a-90a. The only viable option is for content providers to restrict all speech on the Web to that deemed by courts (or prosecutors) to be appropriate under COPA for minors. This similarity between COPA and the CDA, grounded in the very nature of the medium Congress sought to regulate, renders the narrowing distinctions between the statutes ultimately fruitless in overcoming COPA's overbreadth.

While *amici* do not believe that they publish material that is "harmful to minors," they do believe that some of their publications and others like them — which include material of legitimate value for adults (and, in many cases, for children too) under the First Amendment — may be within the reach of COPA. The remainder of this brief discusses some of that threatened material from *amici*'s own web sites or from similar sites published by others to demonstrate the wealth of Web content, far outside the realm of commercial pornography, that is within COPA's overbroad ambit.

B. COPA Is Overbroad Because It Restricts Information About Sexual Health.

To be "harmful to minors," a web communication must depict, describe, or represent a sexual act or sexual contact or must exhibit genitals or a post-pubescent female breast. 47 U.S.C. § 231(e)(6)(B). That requirement can encompass a broad range of sexual information, from basic education about procreation, to "safe sex" instructions for prevention of pregnancy or sexually-transmitted diseases, to health information about gynecological or urological issues. A wealth of such information is available on the World Wide Web.[8]

The Government appears to argue that there can be no question that such information has serious value for minors, so that there is no way that its communication can

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8. *See, e.g.*, Safersex.org, "Condoms!: A Simple Guide to Latex Dams," *http://www.safersex.org/barriers/dam.html* (information by *amicus* Safersex.org on safe sex practices); HIVChannel, "Safe Sex," *http://www.hivchannel.com/prevention/safesex/index.shtml* (information about safe sexual activity for individuals who are HIV positive); The Body, "Ask the Experts About Safe Sex, Prevention & Transmission," *http://www.thebody.com/Forums/AIDS/SafeSex/index.html* (answers to questions concerning safe sex practices); JAMA HIV/AIDS Resource Center, "Treatment Guidelines: Sex and HIV Prevention," *http://www.ama-assn.org/special/hiv/treatmnt/guide/hivguide/hivguid5.htm* (*AMA Journal* site describing safe sex practices); Salon.com, "Sex slave," *http://www.salon.com/sex/feature/2001/05/07/prostate/* (wife's account of coping with husband's sexual dysfunction following prostate surgery); ThriveOnline, "Sexuality," *http://thriveonline.oxygen.com/sex/* (reproductive health); ThriveOnline, "Testicular Self-exam," *http://thriveonline.oxygen.com/medical/medicaltests/test.testicleself.html*; The Male Genitalia Guide, "Testicular Self-exam," *http://www.afraidtoask.com/members/testicle.html*.

be prosecuted under COPA. *Amici* certainly hope that is true, though the result is far from clear. Many segments of today's society deplore the dissemination of sexual information to minors and consider any sexual practices by minors (or any unmarried persons) sinful, and thus "harmful" *per se*. *See generally* "Americans Search for New Sexual Ethic," *San Francisco Chronicle*, p. A1 (Nov. 29, 1994) (noting disapproval of teenage sex among Baptists, Buddhists, Catholics, Methodists, Mormons, Muslims, and Jews, among other religions, despite changing social mores). In this atmosphere, a threat of prosecution cannot automatically be dismissed. But even assuming that some information about sex is protected, there are categories of such information that may be far more vulnerable than others. Consider the following:

Information about obtaining sexual pleasure. Heterosexual sex is respected in all cultures as an act of procreation. But sexual contact also is a source of intense physical pleasure. From time immemorial, men and women have explored ways to fulfill and enhance their sexual feelings —from experimentation with love potions and aphrodisiacs, to invention of new techniques and positions, to study of anatomical and physiological sources of stimulation. All of this information has value for adults. For example, medical professionals frequently have acknowledged the emotional and psychological importance of sexual satisfaction to healthy relationships. *See, e.g.*, D. Satcher, *The Surgeon General's Call to Action to Promote Sexual Health and Responsible Sexual Behavior: A Letter From the Surgeon General*, U.S. Dept. of Health and Human Services, at 2 (July 9, 2001), *http://www.sg.gov/library/sexualhealth/call.pdf*. *See also* Am. Psychiatric Assn., *Diagnostic and Statistical Manual of Mental Disorders* §§ 302.71, 302.79 (1994).

The World Wide Web is a significant source of information about ways of obtaining sexual satisfaction.[9] But does such information have serious value for minors? Any hedonistic view of sexuality is a source of moral disapproval among large segments of the American public, and transmission of such information to children therefore may be viewed by many as no better than transmission of disease. While a prosecutor might well find value for minors in instructing about how to prevent AIDS or how to do self-examinations for breast or testicular cancer, he or she may not agree on the value of instructions on how to provide pleasure to another young man or woman on date night. The web sites providing legitimate information about sexual satisfaction therefore are threatened.

Sexual devices and related topics. Just this year, the Eleventh Circuit considered the constitutionality of an Alabama statute that makes it unlawful to distribute (but not to possess or use) "any device . . . useful primarily for the stimulation of human genital organs." *Williams v. Pryor*, 240 F.3d 944 (11th Cir. 2001). The court noted expert opinions that such devices are used for "standard medical and psychological purposes," including "marital and non-

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9. *See, e.g.*, QuickCondoms.com, "Ask the Sexpert: How to Find the G-Spot," *http://www.quikcondoms.com/content.jsp?ch=sexpert&id=73*; A. Cadell, "Give Your Man the Massage of His Life," *http://www.quikcondoms.com/content.jsp?ch=sexpert&id=125*; S. Gardos, "Dear Dr. Gardos," *http://thriveonline.oxygen.com/sex/experts/drgardos/drgardos.03-07-01.html*; iVillage.com, "Sex Coach: Techniques for Sensational Sex," *http://www.ivillage.com/relationships/experts/sexcoach/articles/0,9632,166929_25676,00.html*; Body Positive, "Sex for People Living with HIV," *http://www.thebody.com/bp/hivsex.html* (site discussing how HIV-positive individuals can enjoy safe, pleasurable, sexual activities); iVillage.com, "Orgasm," *http://www.ivillage.com/topics/relation/sex/0,10707,166919,00.html* (website oriented towards women, articles and answers to online questions about how to engage in pleasurable sexual activities).

marital sexual relationship counseling," and it remanded to determine whether the ban unconstitutionally infringed on the rights of adults challenging the statute. 240 F.3d at 947, 955-56. But the court rejected a facial challenge to the law because, at least as applied to distribution to minors, the statute rationally advanced Alabama's interest in maintaining public morality by discouraging "prurient interests in autonomous sex" and "auto-eroticism, for its own sake, unrelated to marriage, procreation, or familial relationships." *Id.* at 949 (quoting Alabama brief and district court opinion), 954-55.

Williams adequately frames the issue here. Whatever the ultimate judicial outcome on the adults' challenge to the Alabama statute, the fact remains that, as the court in *Williams* acknowledged, there is a legitimate basis for providing information to adults across the nation about therapeutic sexual devices.[10] The First Amendment would not permit that information to be banned. But, at least in the view of the Eleventh Circuit, there is no legitimate reason for minors to have access to such devices, and therefore it may be that the Eleventh Circuit would hold that there is no serious value in providing information about such devices to minors. Under that view, COPA therefore

10. Only a handful of states have statutes like that in Alabama. *See, e.g.*, Colo. Rev. Stat. § 18-7-101; Ga. Code Ann. § 16-12-80; Kan. Stat. Ann. § 21-4301; La. Rev. Stat. Ann. § 14:106.1; Miss. Code Ann. § 97-29-105; Tex. Penal Code Ann. § 43.21, 43.23; Va. Code Ann. § 18.2-373. Courts have been divided on their constitutionality. *See, e.g., People ex rel. Tooley v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348 (Colo. 1985) (statute proscribing "obscene devices" impermissibly burdened right to privacy); *State v. Hughes*, 246 Kan. 607, 792 P.2d 1023 (1990) (same); *Yorko v. State*, 690 S.W.2d 260 (Tex. Crim. App. 1985) (statute did not infringe privacy rights); *Sewell v. State*, 238 Ga. 495, 233 S.E.2d 187 (1977), *appeal dismissed*, 435 U.S. 982 (1978) (statute valid).

would restrict adults' access to this legitimate information.[11]

The discussion in *Williams* points to a related category of threatened sexual information that is available online: that dealing with auto-erotic behavior.[12] There should be

11. Separate from the question of therapeutic sexual devices is that of sexual physical enhancements. Whether for therapy, accident reconstruction, or simple vanity, many Americans undergo procedures or treatments each year for such things as breast augmentation or penile enlargement, and the Web is full of sites about the processes. Some of those sites even contain before-and-after photos and pictorial testimonials. *See, e.g,* G. Rheinschild, "Case studies," *http://www.maleenhancement.com/gwr-case_studies.html;* Implantforum.com, "All About Breast Augmentation: Breast Implant Before and After Photos," *http://implantforum.com/pics/pics.html*. Adults have a right to information about these procedures. As the Court said with respect to tobacco sales in *Lorillard*, 121 S. Ct. at 2426, "it is no less true that the sale and use of tobacco products by adults is a legal activity" and therefore "[w]e must consider that tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products." If, on the other hand, this information is not of serious value for minors, COPA would prevent adults from receiving it. In *Lorillard*, the Court held that, despite the state's interest in protecting against underage tobacco use, such a result was impermissible for information about smokeless tobacco and cigars. The same must hold true for lawful medical information.

12. *See, e.g.*, J. Blank, "Celebrating Masturbation," *http://thriveonline.oxygen.com/sex/sexpressions/masturbation.html;* iVillage.com, "Masturbation," *http://www.ivillage.com/topics/relation/sex/0,10707,166917,00.html* (women-oriented web site); HIV and You, "Safer Sex: Vibrators," *http://www.hivpositive.com/f-HIVyou/4-SaferSex/4-Vibrators.html*. The web presents a ready source that users may consult anonymously to obtain knowledge

little doubt that many would bar such information from minors. In 1994, the Surgeon General was forced to resign because she said that masturbation was "part of human sexuality and it's a part of something that perhaps should be taught" in connection with comprehensive health education.[13] Yet, there also should be little doubt that it is a topic of legitimate value. *See* Gina Kolata, *The Rule Dr. Elders Forgot: America Keeps Onan in the Closet*, N.Y. Times, Dec. 18, 1994, Sec. 4, p. 5 (reporting survey findings that about 60% of adult males, 40% of adult females, 90% of teen-age boys, and 65-70% of teen-age girls had masturbated within year preceding article). If *Williams* is correct that a state has a legitimate interest in preventing autoerotic conduct, at least by minors, it may follow that minors can be barred from receiving information about it. That would cloak such information from adults as well.

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about such a private topic. For one example of an anguished teenager's inquiry to a university web site inviting questions about health topics, *see* Go Ask Alice!, "Bed Humping = Bad Habit?," *http://www.goaskalice.columbia.edu/1720.html* ("I've had a 'bed humping' problem for almost three years now. . . . This web site seems like the only place that can help me right now. I can't talk to any of my family or friends about it. It would be too embarrassing, and I would be afraid. . . . Am I a weirdo or a pervert for doing it?").

13. *See* Center for Reproductive Law and Policy, "On the Hill: Surgeon General Resigns Under Pressure from White House," Reproductive Freedom News, Dec. 16., 1994, vol. III, No. 22, p. 5-6; Evelyn C. White, "Grace Under Fire," San Francisco Chron., May 21, 1995, at M3 (interview with Dr. Joycelyn Elders). *See also* "Simi Valley Church's Program Shocks Some in Community," Associated Press, Mar. 18, 2001 (available on LEXIS; controversy caused by California church program teaching high school-age minors about sexual topics, including masturbation).

Non-traditional sexual practices. Fifteen years ago, this Court upheld against constitutional challenge a Georgia law proscribing consensual sodomy (oral or anal intercourse). *Bowers v. Hardwick*, 478 U.S. 186 (1986). In a concurring opinion, Justice Powell listed two dozen states that had such laws. *Id.* at 198 n.1. Since that time, twelve of those laws have been rescinded or deemed inapplicable to consenting adults, many by legislative action and a few (including that in Georgia) by state judicial decisions. The conduct is now officially lawful for adults in about three-fourths of the country. *See* Lambda Legal Def. & Educ. Fund, "State-by-State Sodomy Law Update," *http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=275*.[14]

In December 2000, the Centers for Disease Control and Prevention reported that "oral sex is commonly practiced by sexually active male-female and same-gender couples of various ages, including adolescents." "What You Should Know About Oral Sex," *ftp://cdcnpin.org/Updates/oralsex*.

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14. Although reported prosecutions are extremely rare, eleven states still criminalize such conduct between any consenting adults. *See* Ala. Code § 13A-6-65; Fla. Stat. § 800.02; Idaho Code § 18-6605; La. Rev. Stat. Ann. § 14:89 (constitutional challenge pending); Mass. Gen. Laws Ann., ch. 272, §§ 34, 35; Minn. Stat. § 609.293; Miss. Code Ann. § 97-29-59; N.C. Gen. Stat. § 14-177; S.C. Code Ann. § 16-15-120; Utah CodeAnn. § 76-5-403; Va. Code Ann. § 18.2-361. Three more criminalize it only for homosexuals. *See* Kan. Stat. Ann. § 21-3505; Okla. Stat. Ann. title 21 § 886; Tex. Penal Code Ann. § 21.06 (constitutional challenge pending). The varying ways in which these states have treated this issue, particularly when contrasted with the states that have not criminalized such conduct at all, underscore local differences on these issues and demonstrate the local nature of the "community standards" inquiry under COPA. Because web sites cannot limit or control their reach geographically, the way a paper publisher may, they are especially vulnerable to differing "community standards" analyses when they deal with topics like these.

PDF. The report warned of misconceptions regarding the practice, including the fact that many adolescents (perhaps influenced by news reports during the Lewinsky controversy) "do not consider it to be sex" and "therefore they may use oral sex as an option to experience sex while still, in their minds, remaining abstinent." *Id.* The report warned further of risks of transmission of the AIDS-causing virus HIV if the practice is not followed safely. *Id.*

Numerous web sites provide information about oral and other non-vaginal sexual conduct, including instructions and safety pointers.[15] Clearly, this is legitimate health information for many adults. Just as clearly, however, this entire subject is repulsive and anathema to others. As the Supreme Court of Georgia noted when it struck down the law considered in *Bowers*, "many believe that acts of sodomy, even those involving consenting adults, are morally reprehensible." *Powell v. State*, 270 Ga. 327, 335, 510 S.E.2d 18, 26 (1998). States that have legalized these practices have done so only if there is consent, and minors usually are presumed incapable of consent (though the age of consent varies greatly from state to state). Accordingly, information about these practices remains a likely candidate for prosecution under COPA because it may not be deemed of value to minors.[16] Again, adults will be

15. *See, e.g.*, QuickCondoms.com, *"How to Give Oral Sex to a Man – Beginner," http://www.quikcondoms.com/content.jsp?ch=sexpert&id=85*; Go Ask Alice!, "Oral Sex with a Condom – Does It Feel Good to the Recipient?," *http://www.goaskalice.columbia.edu/1614.html*; T. Cox, "Oral Sex: Tips for Her and Him," *http://www.ivillage.com/relationships/experts/experts_by_month/articles/0,9632,166929_92901,00.html*; S. Gardos, "Dear Dr. Gardos," *http://thriveonline.oxygen.com/sex/experts/drgardos/drgardos.04-09-01.html*.

16. Perhaps, in light of the medical findings, there will be an exception for disease-prevention information.

proscribed from readily obtaining information to which they are entitled under the First Amendment.

Homosexual activities. This Court is no stranger to the emotionally-charged issues relating to gay rights. In his dissent in *Romer v. Evans*, 517 U.S. 620, 644-48, 652 (1996), Justice Scalia described a "culture war" between "those who wish to retain social disapprobation of homosexuality" and those who do not. The Court in that case struck down as discriminatory a state constitutional provision prohibiting laws designed to protect gays and lesbians. In *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), the Court held that the Boy Scouts were not required to admit a homosexual member because they believe that homosexuality is inconsistent with their values. Justice Stevens' dissent in *Dale* recounted "remarkable changes in attitudes about homosexuals" that have occurred in recent years. *Id.* at 699-700.

The World Wide Web contains a large amount of information about homosexual practices, including, for example, The Body, *http://www.thebody.com*, an AIDS and HIV information site to which the AIDS Project of *amicus* Lambda Legal Defense and Education Fund is a frequent contributor.[17] To the extent that this information is not already in danger under COPA because it deals with non-traditional sexual conduct such as sodomy, the fact that it relates to same-gender relationships is bound to cause it to be labeled by many as unsuitable for minors. Those desiring to retain what Justice Scalia called "moral and social disapprobation of homosexuality" (*Romer*, at 645) surely might disapprove of imparting information to minors

17. Articles from The Body are cited earlier in this brief. Other examples include: Mogenic, *http://www.mogenic.com/* (site providing columns, advice, forum for gay and lesbian individuals); Stop AIDS Project, "Oral Sex – Is It Safe?," *http://www.gay.com/* (site devoted to "connecting the lesbian, gay, bisexual and transgender communities").

about gay sexual practices. If such information is shielded under COPA, adults will be prevented from obtaining this important material.

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The First Amendment does not protect only information that the majority of Americans like or approve. *Texas v. Johnson*, 491 U.S. 397, 420 (1989) (Kennedy, J., concurring). Few subjects are as likely to cause discomfort as frank discussions of sex, and particularly discussions of sexual topics that are outside of the mainstream. And few subjects are as likely to raise concerns as such discussions in the presence of minors. Most Americans agree that it is appropriate to protect minors from material that is unsuitable for them. But COPA's restrictions on sexual speech to protect minors are likely to prevent *adults* from engaging in a large amount of Internet discourse about sexual health that is legitimate and valuable. For that reason, COPA is unconstitutionally overbroad.

C. COPA Is Overbroad Because It Restricts Artistic and Intellectual Expression.

The overbreadth of COPA threatens more than the dissemination of *information*, as in the examples just discussed. Its chilling effect is acutely felt among those who wish to use the Web for artistic or intellectual *expression*. The "harmful-to-minors" test that COPA sets forth cannot offset this chill, for it utilizes an inquiry that is fundamentally subjective, and therefore flawed in its attempt to distinguish content that may be appropriate for minors from that which may be appropriate for adults. This is especially evident when evaluating whether any given example of expression possesses serious literary or artistic value for minors as opposed to adults.

Perhaps the best illustration of COPA's unconstitutional overbreadth is the posting of visual art on the

Internet. Museum web sites provide information about their exhibits and also display actual works of art online. These museums, like many other content providers, have no cost-effective, reliable means of distinguishing adults from minors among their audience, and thus are reduced under COPA to censoring all of their posted artwork accordingly to a standard that permits only works deemed of serious value to minors, without regard to whether works failing that amorphous test still have serious value for adults. As the degree of subjectivity applicable to such evaluations of "serious value" increases, this overbreadth problem is magnified.

Online exhibits of the nude photography of Robert Mapplethorpe exemplify this point. Mapplethorpe's works have received both acclaim and extreme approbation, and were a topic of discussion by both the district court and this Court in *Reno*. The district court in *Reno* observed that the government had *conceded* that Mapplethorpe's photographs "would be patently offensive in some counties." *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 855 (E.D. Pa. 1996). This Court, in a part of its opinion adopting findings of the district court, specifically referred to works of Mapplethorpe exhibited on the web site of *amicus* California Museum of Photography at The University of California, Riverside (UCR) –

> "when the UCR/California Museum of Photography posts to its Website nudes by Edward Weston and Robert Mapplethorpe to announce that its new exhibit will travel to Baltimore and New York City, those images are available not only in Los Angeles, Baltimore and New York City, but also in Cincinnati, Mobile, and Beijing – wherever Internet users live."

521 U.S. at 854.[18] This observation is equally pertinent to COPA, which includes within its scope all content "available to any minor." Thus, despite all the efforts Congress devoted to making COPA narrower than the CDA, this artistic content, threatened before, remains threatened.

The fact of the matter is that works of art often are provocative, which to many means that they are offensive and without value. *See generally National Endowment for the Arts v. Finley*, 524 U.S. 569, 574-75 (1998) (discussing works of Mapplethorpe and Andres Serrano). Disputes about the merit of artistic expression occur frequently in our country, such as when the Museum of International Folk Art, a

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18. A picture of a UCR web page comparing the works of Weston and Mapplethorpe (which is still on the Web today, *http://www.cmp.ucr.edu/exhibitions/w_m/wm2.html*) was featured in briefs submitted to the district court and this Court in *Reno* by *amici* that included UCR:

Source: http://www.cmp.ucr.edu/exhibitions/w_m/wm2.html

A comparison of *Weston's Nude Floating*, 1939 and Mapplethorpe's *Thomas*, 1986, provides one example of the shift in context presented by this exhibition.

Weston's *Nude Floating*, 1939, an image of a women floating face up in a swimming pool, with Mapplethorpe's *Thomas*, 1986, an image of a nude man tautly posed in a square structure. Here, the modern, formal analysis usually applied to Weston's work expands to embrace postmodern themes rooted in societal relationships, gender, race, and sexuality. Likewise, Mapplethorpe's work examined next to Weston's invites the viewer to look beyond the lingering NEA controversy and see the image for its formal complexities in the tradition of modernist photography. In both cases the comparisons serve to more firmly ground the artists' work in 20th century art practice.

CAPTIONS:
Edward Weston, *Nude Floating*, 1939. Special Collections, UC/Santa Cruz.
Robert Mapplethorpe, *Thomas*, 1986, Robert Mapplethorpe Foundation, © 1986. Estate of Robert Mapplethorpe. Used by permission.

Other examples of Mapplethorpe's work that are posted on UCR's web site include: *Lisa Marie, http://www.photography.net/assets/duplicate1/maple003_Hnew.jpg; Lydia Cheng, http://www.photography.net/assets/duplicate1/maple004_Hnew.jpg;* and *Sonia Resika, http://photography.net/assets/duplicate1/maple005_Hnew.jpg. See also,* R. Mapplethorpe, *Man in a Polyester Suit, http://witcombe.sbc.edu/masculinity/malefallacies7.html.*

branch of Santa Fe's Museum of New Mexico, displayed an artistic depiction of Our Lady of Guadalupe, the popular Hispanic image of the Virgin Mary. *See Santa Fe Madonna Sparks Firestorm*, Art in America, Jun. 1, 2001, No. 6, Vol. 89, p. 23. The image, by California artist Alma Lopez, was a computerized photo collage of the Virgin wearing a bikini of roses and held aloft by a buxom, bare-breasted angel. It is now posted by her on the Web (*Our Lady, http://www.almalopez.net/*). While Lopez based the image on her feminist Hispanic background and considered it reverential, Santa Fe residents responded with threats of censorship and the show's curator was accused of promoting "cyber porn." *Id.*

Controversies such as these prove that the subjectivity of artistic expression makes it fertile ground for a statute that requires courts to distinguish as a matter of law between content of value to minors and content of value to adults. There is much art already on the Web, including but not limited to photographic art, available on museum web sites and potentially within COPA's "harmful to minors" definition.[19] COPA's overbreadth endangers the availability of these works to adults and may ensure that additional works of artistic value to adults will never become available on the Web in the future.

Private art galleries face the same problem. Indeed, because art galleries tend to exhibit newer original works not yet vetted by the art world and accepted as at the level of inclusion in museum collections, the problem may be

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19. *See, e.g.*, Metropolitan Museum of Art, *Study of a Nude Man, http://www.metmuseum.org/collections/view1.asp?dep=11&item=52%2E71*; Getty Museum Collections, Paul Outerbridge, *Woman with Meat Packer's Gloves, http://www.getty.edu/art/collections/objects/o62648.html*; UCR, California Museum of Photography, "Continuous Replay: The Photographs of Arnie Zane," *http://www.cmp.ucr.edu/photography/zane/default.html*; *id.*, "The Torsos," *http://www.cmp.ucr.edu/photography/zane/torsos.html*.

heightened. *Amicus* Chuck More, for example, posts on the Web site for his Philadelphia art gallery a variety of nudes that might reasonably be construed as satisfying COPA's definitions of what is "harmful to minors," yet have serious artistic value for adults.[20] Art galleries abound on the Web, and examples of content that is of serious value to adult collectors yet might be deemed to fall within the definition of "harmful to minors" are not difficult to find.[21]

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20. *See, e.g.*, More Gallery, Nelson Shanks, *Squeaky's Beads*, *http://www.moregallery.com/GifWrap1.asp?RecordNumber=549*.

21. *See, e.g.*, the nudes of Edward Weston (*Nude, New Mexico, 1937, http://www.edward-weston.com/portfolios/images/nudes1/nude_new_mexico.html; Nude, 1936, http://www.edward-weston.com/portfolios/images/nudes1/nude_219n.html; Nude, 1927, http://www.edward-weston.com/portfolios/images/nudes1/nude_7n.html*); the nudes of Tomasz Rut ("Couples Gallery Page," *http://www.tomaszrut.com/pages/art/rut/couples.htm; Il Momemto, http://www.tomaszrut.com/pages/art/rut/il_momento.htm; Adamo, http://www.tomaszrut.com/pages/art/rut/adamo.htm*; and *Impromptu II, http://www.tomaszrut.com/pages/art/rut/impromptu2.htm*); New York Art World, Joseph Catuciio, *Untitled Mural 8, http://www.newyorkartworld.com/gallery/catuccio.html;* Motley Focus Locus, "Images" gallery, *http://www.motley-focus.com/~timber/images.html* (gallery "look[s] for overtones of heart, mind and sensuality in all the art [it] select[s]" with "no preconceived restrictions"); *id., Power 1, http://www.motley-focus.com/~timber/power1.html;* the photography of David Glove ("Fine Art Photography Nudes for Men and Women," *http://www.redshift.com/~daveslite/*; "Narcissus in Hell," *http://www.redshift.com/~daveslite/Narchome.htm; Lighten Up, http://www.redshift.com/~daveslite/lighten_up.htm; Host, http://www.redshift.com/~daveslite/host.htm*; "Studio Exotica," *http://www.redshift.com/~daveslite/studiomenu.htm*); and the untitled works of Pennsylvania artist Scott Church ("Welcome to My Daydream," *http://www.angelfire.com/pa/scottchurch/*; The Art of Scott Church, *http://users2.nbn.net/~schurch/images/torso1.jpg; id., http://users2.nbn.net/~schurch/images/hnc.jpg*).

The First Amendment does not tolerate banning non-obscene art works from adult viewers merely because such works could be deemed harmful to minors. *See American Booksellers*, 484 U.S. at 389. But COPA subjects art exhibited on the World Wide Web to precisely that damage. In this sense, COPA is just as overbroad, and just as chilling to freedom of expression, as was the CDA, and all Congress' efforts to narrow the statute's reach are for naught.

The *American Booksellers* decision also illustrates the potential harm posed by COPA to *amici* like the Authors Guild and the American Society of Journalists and Authors. Many of the controversial literary works at issue in that case are on the Web.[22] These *amici* represent thousands of writers, any number of whom may want or need at some point to place their writings – essays, articles, poetry, short stories, and more – on the Web. If federal courts could be uncertain and divided as to whether James Joyce's *Ulysses* – a novel of recognized literary value to adults – is "harmful to minors," as in *American Booksellers*, then certainly it is reasonable for other authors (and especially those not yet as widely received and studied as is Joyce) to feel uncertain about whether their own literary works might be viewed by some prosecutor or court as lacking in literary or artistic value to minors and therefore deemed in violation of this criminal statute. The only safe response to

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22. In some cases, they are newer editions, or at least excerpts from the works. Examples include: R. Bell, *Changing Bodies, Changing Lives* (3d ed. 1998), *http://www.ourbodiesourselves.org/cbcl.htm* (excerpts); J. Collins, *Hollywood Wives: The New Generation* (2001), *http://www.chron.com/cgi-bin/auth/story/content/chronicle/ae/books/01/07/01/collinsch1.html* (excerpts); S. Donaldson, *Lord Foul's Bane* (1977), *http://netserver.massmedia.com/~mikeb/booktour/lord_fouls_bane.htm*; J. Joyce, Ulysses (1961), *http://www.bibliomania.com/0/0/29/61/frameset.html, http://www.robotwisdom.com/jaj/ulysses/index.html; Our Bodies Ourselves for the New Century* (1998), *http://www.ourbodiesourselves.org/excerpts.htm* (excerpts).

such reasonable concern is self-censorship, and the result is that the Web would then never see an inestimable amount of literary creations. This affects not only the authors, but also adult Web users, who would be the poorer for the inevitable limitation of literary works available in this medium. Thus is COPA's overbreadth exposed.

The multi-media nature of the Web, synthesizing as it does not only textual but also audio and visual expression, means that even artistic expression not readily reducible to print form is fully available to both adults and minors. This is true, for example, of music. Lyrics of popular and even critically acclaimed songs are available on the Internet both in text form and audio streams.[23] Once it is posted on the Web on commercial music sites, this music is available to adults and minors without distinction. Whether courts ultimately will determine that such expression lacks "serious . . . artistic . . . value for minors" cannot be answered neatly and with certainty by content providers, again illustrating that COPA unconstitutionally reduces content on the Web to only that deemed fit for children.

D. COPA Is Overbroad Because It Restricts Access to Materials of Educational Value to Adults.

The widespread use of the World Wide Web by educational institutions presents another example of the tension between online expression and the resulting overbreadth of COPA. The statute fails to acknowledge, let alone constitutionally reconcile, this tension, since "educational" value is not even listed in Section 231(e)(6)(C).

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23. *See, e.g.*, Public Enemy, *http://www.publicenemy.com/lyrics/* (lyrics to songs by hit music group); Limp Bizkit Fan Site, *http://www.geocities.com/ResearchTriangle/Node/7156/sites/limpbizkit.html* (fan site with lyrics); Eminem, *http://www.eminem.com/* (providing recent Grammy-award winning music of artist Eminem).

Recognizing the power of the Internet to transmit ideas, educational institutions have established a significant presence on the Web. Education and intellectual pursuit through those web sites perhaps best evidences the dual aspect of COPA's overbreadth that is at play here: the statute restricts not only content providers but also content seekers. As content providers, professors post course materials, and college and graduate students post academic work product, on the Web. But where the Web truly shines is in its ability to make a mind-boggling array of information and expression readily available to students — including adults — in a wide variety of academic disciplines. Students of anything from abnormal psychology to sociology, gender studies to literature, may plumb the Web for knowledge, ideas and understanding of their studies and of the wider world around them. As an essential part of the human experience, sexuality will inevitably be part of that process, sometimes in ways that some may believe appeal to prurient interests and lack serious value, at least for minors. And, as demonstrated above, much of this content may be found on web sites that fit within COPA's broad definition of "commercial." It is axiomatic that, in narrowing content available on the Web to that which is not "harmful to minors," much that is valuable for adults will be lost. This result of COPA's overbreadth is the antithesis of the limitless marketplace of ideas that the Web has come to exemplify.

An example of how educators use the Web to this dual purpose is provided by *amicus* Peter Ludlow, an Associate Professor in the Department of Philosophy at the State University of New York at Stony Brook, who places online the course materials for his "Conceptual Issues in Cyberspace" and "Moral Reasoning" classes. *See, e.g.*, P. Ludlow, "High Noon on the Electronic Frontier: Conceptual Issues in Cyberspace," *http://semlab2.sbs.sunysb.edu/Users/pludlow/highnoon.html*. The courses cover such issues as the nature of online sexual behavior in multi-user online games and application of moral reasoning concepts to ethical dilem-

mas that arise in cyberspace. They include discussions of censorship on the Web – with sites threatened under COPA among the course materials. These items, intended for use by young adults in the university setting and of serious value to them academically, would be equally available to minors on the Internet.

The same is true of a course entitled "Sex and Gender in Pre-Modern Europe," offered in the History Department of the University of North Florida. The class web site for the 'Sex and Gender" history course states that the class syllabus, outline, and other handouts also have been made available on the Web precisely because "[t]he Internet is now a valuable research tool for students."[24] Moreover, required class readings include "primary documents available on the World Wide Web," and the site includes hyperlinks to those documents in full text. These links are to readings that discuss sexuality, including a comparison of the merits of sexual relations with women versus that with young boys in an ancient Greek text; discussions of homesexuality by ancient Romans; classical descriptions of lesbianism; and an account of the gay subculture in early eighteenth-century London.[25] Whether texts such as these fall within COPA is not a clear-cut question, but under COPA's "harmful to minors" definition the potential is real, and the resulting reasonable uncertainty would be

24. *See* Sex and Gender in Pre-Modern Europe, *http://www.unf.edu/classes/sexgender/* (class web site).

25. *See id.* (fn. 24, *supra*), linking to: Anchilles Tatius, *Leucippe and Clitophon*, "Women unfavorably compared with boy lovers," *http://www.uky.edu/ArtsSciences/Classics/wlgr/wlgr-privatelife241.html*; Seneca, "Natural Questions" (excerpt), *http://www.fordham.edu/halsall/pwh/seneca-nq1-16.html*; Lucian, *Dialogues of the Courtesans*, "Leaena and Clonarium," *http://www.fordham.edu/halsall/pwh/lucian-court.html*; Rictor Norton, *Gay History & Literature*, "The Gay Subculture in Early Eighteenth-Century London," *http://www.infopt.demon.co.uk/molly2.htm*.

sufficient to chill this Web-based speech that has serious academic value for adults.[26] That is the essence of *amici*'s argument for why COPA is, ultimately, unconstitutionally overbroad.

26. Another example is presented in an essay posted by a Sweet Briar College art history professor on the school's web site. *See* Christopher Witcombe, "Male Fallacies: Images of Men and Masculinity in Art," *http://witcombe.sbc.edu/masculinity/index.html*. The site includes several images that might simultaneously be deemed "harmful to minors" and yet have literary, artistic, and even political value for adults. Analytical text that accompanies each image conveys the academic purpose of the professor's use of the image as well as the artistic and political messages intended by their creators. *See, e.g., id.*, "Phallic Power," *http://witcombe.sbc.edu/masculinity/malefallacies7.html*.

CONCLUSION

COPA's breadth exceeds that which is necessary to accomplish any legitimate objective of Congress. It therefore violates rights of free expression under the First Amendment. For the foregoing reasons, *amici curiae* urge the Court to affirm the decision of the three-judge panel that preliminarily enjoined enforcement of the Child Online Protection Act, and to hold that COPA is unconstitutional.

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The **American Society of Journalists and Authors** is a national organization of leading independent writers of non-fiction. Many of the members write on sexuality, science, medical, and marital issues. Some write directly for the World Wide Web; others write for the print media. In both cases, the works often are placed on the web. The Society and its members are concerned that COPA will prohibit its members' writings from being placed on the Web and will chill free expression online.

The **Authors Guild** is a national association of almost 8,000 professional book and periodical writers of all genres, including journalists, historians, biographers, and other writers of fiction and nonfiction. Founded in 1912, it is the oldest and largest organization of published writers in the United States. Members of the Authors Guild include winners of the Pulitzer and Nobel Prizes, National Book Awards, and other prestigious awards and prizes. The Authors Guild works to promote the professional interests of its members and to educate the community at large on issues facing publishing-related industries.

One of the Authors Guild's principal purposes is to express its members' views in cases involving questions of freedom of expression and to support that fundamental constitutional right. Many of its members rely heavily on the extraordinary opportunity for free and open communication offered by the World Wide Web, which allows its members to participate in a true "marketplace of ideas." The Authors Guild opposes COPA because it will chill free speech in this important forum.

Bay Area Lawyers for Individual Freedom ("BALIF") is a minority bar association of over 500 lesbian, gay, bisexual, and transgender members of the San Francisco Bay Area legal community. Founded in 1980, BALIF promotes the professional interests of its members and the legal interests of the gay, lesbian, bisexual, and transgender community at large. As part of that mission,

BALIF actively participates in public policy debates concerning the rights of lesbians, gay men, bisexuals, and transgender persons. BALIF frequently appears as an *amicus curiae* in cases where it can provide perspective and argument that will inform a court's decision on a matter of broad public importance, such as this case. BALIF believes that while some of the purposes underlying COPA may be laudable, the statute is unconstitutionally broad in that it infringes upon important, legitimate speech of particular interest to the gay, lesbian, bisexual, and transgender community.

Since 1993, the **California Museum of Photography at the University of California, Riverside** ("UCR/CMP") has been producing exhibitions on the Internet that combine both fine art and scholarship. The Museum promotes understanding of photography and related media through collection, research, exhibition, and instruction, and is vitally concerned with the intersection of photography, new imaging media, and society. The Museum provides a supportive and challenging environment that stimulates discourse about issues relevant to the lives and interests of artists, scholars, and the general public. *See generally* UCR/CMP Information, *http://www.cmp.ucr.edu/photo/info.html#sheet/*. UCR/CMP hosts a Museum Store on its website and has joined the world's largest online bookstore, Amazon.com, to offer the most comprehensive collection of fine art books, CD's, and videos, through a link from that online Museum Store. Part of every purchase made through the Amazon.com link in the Museum Store is used to benefit the Museum. *See* UCR/CMP Museum Store, *http://www.cmp.ucr.edu/books/*.

The Museum is concerned that such online exhibits as a comparison of the work of photographers Edward Weston and Robert Mapplethorpe (*see http://www.cmp.ucr.edu/exhibitions/w_m/wm2.html*), Lucien Clergue's Nudes (*see http://www.cmp.ucr.edu/exhibitions/signs/*), and Robin Rosenweig's Three Bodies (*see http://www.cmp.ucr.edu/photography/bodies/*) may be restricted by COPA. The Museum has long championed use of the Internet as an expressive medium for both individual artists and for collaborative activities. Provisions in the COPA could prohibit both advanced scholarship in the visual arts and practice by contemporary artists exploring the unique attributes of the Internet as a medium for pictorial discourse and active collaboration across state and international boundaries.

Lambda Legal Defense and Education Fund is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, and people with HIV/AIDS through litigation, education and public policy work. Lambda was founded in 1973 and brought the first AIDS discrimination lawsuit in 1983. Much of Lambda's litigation and advocacy work focuses on ensuring that lesbians and gay men can communicate openly about their sexual orientation without retribution, and on ensuring that all people — including young people — have access to accurate, understandable HIV prevention and treatment information.

Lambda uses the Internet to communicate with its clients and constituents, and to disseminate information about legal and policy issues related to sexual orientation or AIDS to lawyers and grassroots activists throughout the United States and abroad. Lambda's AIDS Project frequently contributes to a Web site — The Body, *http://www.thebody.com* — that is dedicated to providing a wide range of medical, social, political, and legal information of importance to people with HIV. Lambda also has designed its own Web site, through which it attempts to reach gay youth with information about their rights and about resources that may help them deal with the isolation that so many gay and lesbian adolescents feel in homophobic family, school, or community environments. Lambda GLBT Community Services, *http://www.lambda.org/*. Lambda also uses the Internet to distribute press releases.

Expression about topics related to sexuality, or about sex itself, has inherent value and should remain free from government interference on the Internet. COPA jeopardizes Lambda's own postings on Web sites and ongoing use of the Internet to communicate with individuals across the country and internationally about gay- or HIV-related issues.

Dr. Peter Ludlow is an Associate Professor in the Department of Philosophy at the State University of New York at Stony Brook. Included among the classes he teaches is a course entitled "Conceptual Issues in Cyberspace," which covers, in the online context, such philosophical issues as the nature of self and community. His practice is to place all of his course materials for the class on his home page, but COPA would place a chill on this teaching practice, and would compel him to remove some of the more controversial materials from his web site. See P. Ludlow, "High Noon on the Electronic Frontier: Conceptual Issues in Cyberspace," *http://semlab2.sbs.sunysb.edu/Users/pludlow/highnoon.html*. He believes that under COPA he may be prohibited from placing on that site materials relating to the nature of online sexual behavior in MUDs (multi-user interactive games played over the Internet) and other materials that are essential to the course but that may be termed "harmful to minors." The teaching materials used for his course and located on his home page were published in his books *High Noon on the Electronic Frontier: Conceptual Issues in Cyberspace* (MIT Press 1996) and *Crypto Anarchy, Cyberstates, and Pirate Utopias* (MIT Press 2001).

Professor Ludlow has also offered a course entitled "Moral Reasoning," which applied traditional concepts in moral reasoning to the ethical dilemmas that arise in cyberspace. Included on the class syllabus were discussions of censorship on the Internet and COPA itself. Professor Ludlow believes he cannot comprehensively or meaningfully teach these issues without giving examples of com-

munications that might be "harmful to minors" under COPA but which nevertheless are worthwhile communications, and that he cannot do so without violating COPA himself. Professor Ludlow was able to make available on the class web site most of the materials for the course, but would feel unable to provide online copies of the more controversial materials, and would be forced to either allude to their contents, or locate published hard copy versions of those materials where they exist, if COPA went into effect.

In addition to work that he does in academia, Professor Ludlow consults for information technology executives on issues relating to activities in the "internet underground." *See, e.g.*, CHAOS University 2001, *http://www.pm2go.com/chaos_university/agenda_p1.asp*. Here too, it is useful for Professor Ludlow to make available materials to potential clients – materials that may well be considered "harmful to minors" under the overly broad definition in COPA.

Professor Ludlow also uses his web site as a location to familiarize individuals with his books, and he provides links to the publishers of those books. In this respect, given the overly broad notion of commercial web sites, Professor Ludlow is concerned that his site may be considered commercial – all the more so in view of his consulting activity. He views COPA as directly targeting both his ability to teach and to consult effectively.

Chuck More owns an art gallery in Philadelphia, Pennsylvania. He authors a Web site to display exhibitions of artwork sold at his gallery. *See* The More Gallery, *http://www.moregallery.com/*. The art displayed on his site regularly includes nudes, both painted and photographed. *See id.* Such artwork, displaying as it does sexual organs, could be considered "harmful to minors" according to the standards of some communities, thus placing Mr. More in jeopardy of criminal prosecution.

Don Rittner is the publisher of **The MESH — Inside Cyberspace**, a Web version of a monthly magazine covering the Internet. *See* The MESH — Inside Cyberspace, *http://www.themesh.com:80/meshinfo.html*. Mr. Rittner believes that COPA, if put into effect, will limit his choice of content for his magazine, thus infringing on his First Amendment right to free expression. He further believes that it is unclear under the terms of COPA precisely what speech he must remove or exclude to avoid prosecution and that, in order to reconcile this lack of clarity, he will be required to take an overbroad view of materials that might be deemed "harmful to minors."

Safer Sex Institute ("SSI") is an unincorporated association for which Safersex.org is the service mark. Safersex.org is the oldest safer sex educational site on the Internet. The site has been repeatedly named as one of the "best of the net" Web sites and is mentioned in numerous CD-ROMs, college textbooks, and other popular books concerning sexuality and health on the Internet. Over 80,000 people per month examine the Web site. The information on the site includes definitions of sexual organs, sexually transmitted diseases, and other issues related to sexuality that could be considered "harmful to minors" according to particular community standards. *See* SaferSex.org, *www.safersex.org*.

The **Sexuality Information and Education Council of the United States (SIECUS)** is a national nonprofit organization incorporated in 1964 that develops, collects, disseminates, and promotes comprehensive information about sexuality, and advocates the rights of individuals to make responsible sexual choices. *See* SIECUS, *http://www.siecus.org/*. It believes that sexually explicit speech and visual materials are indispensable elements of sexuality education, and that COPA may restrict the appropriate professional use of such materials by sexuality educators, therapists, and researchers. *See id.*